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In the Supreme Court of the United States

OCTOBER TERM, 1994

STEVEN KURT WITTE, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTION PRESENTED

Whether the Double Jeopardy Clause bars a court from convicting and sentencing a defendant for an offense solely because the conduct underlying that offense was previously considered, under the Sentencing Guidelines, in determining the defendant's sentence for a separate offense.

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OPINIONS BELOW

The opinion of the court of appeals (J.A. 137-166) is reported at 25 F.3d 250. The opinion of the district court (J.A. 130-136) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on June 23, 1994. The petition for a writ of certiorari was filed on September 21, 1994, and was granted on January 6, 1995. J.A. 167. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATEMENT

A grand jury in the Southern District of Texas charged petitioner with conspiring to import cocaine and attempting to import cocaine, both in violation of 21 U.S.C. 952(a) and 963. J.A. 82-83. The district court dismissed the indictment on double jeopardy grounds. J.A. 130-136. The court of appeals reversed. J.A. 137-166.

1. a. In August 1989, federal undercover agent Roger Norman discussed with Dennis Mason in Tucson, Arizona, a plan to import 1,000 kilograms of marijuana from Mexico to Houston, Texas. Those discussions ended when Norman failed to provide the requested down payment. Presentence Report (PSR) 2. Norman and Mason resumed negotiations in Houston in June 1990, this time joined by petitioner and Tom Pokorny. Petitioner, Pokorny, and Mason eventually planned to import both 15 tons of marijuana from Mexico and at least 500 kilograms of cocaine from Guatemala, with the two arrangements proceeding simultaneously. Norman was to fly to Mexico and transport the drugs back to the United States. PSR 3-5, 7-8.

In July 1990, the Mexican source for the marijuana indicated that cocaine might be added to the shipment if there were room on the plane or if marijuana were not available. The next month, Norman was told that the Mexican suppliers were ready to ship 4,400 pounds of marijuana. After learning the location of the airstrip, Norman arranged to have the participants arrested in Mexico. On August 12, 1990, Mason and four others were apprehended. Instead of marijuana, authorities seized 591 kilograms of cocaine. The following day, Norman told petitioner that the pilots had been unable to land in Mexico because police had arrived at the airstrip. PSR 5-6.

b. Agent Norman next spoke with petitioner on January 25, 1991, when Norman contacted petitioner to ask if he would like to purchase 1,000 pounds of marijuana. Petitioner said that he would call Norman back to tell him whether he could raise the $50,000 down payment. Three days later, petitioner called Norman to say that he had the down payment. Petitioner indicated that he would use a horse trailer purchased earlier and a motor home owned by an acquaintance, Sam Kelly, to transport the marijuana. PSR 6-7; see also J.A. 39-40.

On February 7, 1991, petitioner met Norman in Houston. He told Norman that he could provide only half of the agreed down payment. Norman agreed to accept $25,000 in exchange for 1,000 pounds of marijuana, allowing petitioner three days to obtain the balance. Petitioner showed Norman and other undercover agents the motor home and its various hidden compartments, and the other agents left to load the motor home and the horse trailer. Petitioner and Norman then went to petitioner's hotel room, where petitioner showed Norman the $25,000. PSR 6-7; see also J.A. 40.

The next morning, Norman and another agent met petitioner and Kelly at petitioner's hotel. Petitioner introduced Kelly as the driver of the motor home, and Kelly was taken to a shopping mall where the motor home and trailer were parked. Kelly was arrested after he took possession of the vehicles, which were loaded with marijuana. Petitioner was arrested at his hotel. PSR 6-7; see also J.A. 40-41.

2. In March 1991, a grand jury in the Southern District of Texas returned a two-count indictment against petitioner and Kelly for conspiring and attempting to possess marijuana with the intent to distribute it, in violation of 21 U.S.C. 841(a) and 846. J.A. 9-10. The indictment was limited to conduct occurring on or about

January 25 through February 8, 1991. *Ibid.* In February 1992, pursuant to a plea agreement, petitioner pleaded guilty to the attempted possession count. J.A. 11-15, 32-43. Petitioner agreed to cooperate with the government by providing complete and truthful information, and the government agreed to dismiss the conspiracy count and to file a motion under Sentencing Guidelines § 5K1.1 if petitioner's cooperation amounted to substantial assistance. J.A. 14. The government also stipulated at the plea hearing that Kelly actually took possession of only about 375 pounds of marijuana, rather than the 1,000 pounds discussed in the negotiations. J.A. 17-20, 41, 59.

The presentence report determined that petitioner was accountable for a total quantity of drugs equivalent to 232,261.6 kilograms of marijuana. PSR 9. The report arrived at that figure by adding (1) 1,000 pounds (453.6 kilograms) of marijuana that the report found to be involved in the attempted possession offense to which petitioner pleaded guilty; (2) the 15 tons (13,608 kilograms) of marijuana that petitioner, Mason, and Pokorny had planned to import from Mexico in 1990; (3) the 500 kilograms of cocaine (equivalent to 100,000 kilograms of marijuana) that petitioner, Mason, and Pokorny had planned to import from Guatemala in 1991; and (4) the 591 kilograms of cocaine (equivalent to 118,200 kilograms of marijuana) seized at the Mexican airstrip on August 12, 1990. PSR 9; Sentencing Guidelines § 2D1.1, Application Notes 6, 10 (drug equivalencies).

At the sentencing hearing, both petitioner and the government objected to the PSR's quantity determination on the ground that the parties had agreed that the quantity of marijuana involved in the offense was 375 pounds. J.A. 55-56, 59-60, 62, 63-65. Both parties also urged the court to rule that the discussions and activities concerning importation of marijuana and cocaine

in 1990 were not part of the same course of conduct as the 1991 marijuana offense to which petitioner had pleaded guilty, and therefore should not be considered in sentencing for the 1991 offense. J.A. 60-65.

The district court concluded that the 1990 importation offenses were "relevant conduct" under Guidelines § 1B1.3 for the purpose of determining petitioner's sentence with respect to the 1991 possession offense. J.A. 68-69. The court therefore accepted the PSR's aggregation of the quantities of drugs involved in the 1990 and 1991 episodes, resulting in a base offense level of 40. J.A. 68, 80-81; PSR 9. After making offsetting adjustments for an aggravating role in the offense and for acceptance of responsibility, the court determined that petitioner's Guidelines sentencing range was 292-365 months' imprisonment. J.A. 68, 80-81; PSR 9. Granting the government's motion under Guidelines § 5K1.1 based on petitioner's substantial assistance, the court departed downward by 148 months to arrive at a sentence of 144 months' imprisonment. J.A. 57-58, 68, 76, 81. Petitioner filed a notice of appeal, but his appeal was dismissed five months later for failure to file a brief. J.A. 2.

3. In September 1992, another grand jury in the same district returned a two-count indictment against petitioner and Pokorny for conspiring and attempting to import cocaine, in violation of 21 U.S.C. 952(a) and 963.[1] J.A. 82-83. That indictment was limited to conduct occurring on or about August 18, 1989, through August

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[1] The government sought separate indictments for the 1990 and 1991 offenses because it did not view them as part of the same course of conduct, and because at the time of the first indictment it had not yet completed investigation of (or apprehended all participants in) the more complicated 1990 offenses. J.A. 156 n.43; see also J.A. 92. Although both indictments named petitioner, they involved different co-defendants. J.A. 9-10, 82-83.

15, 1990. *Ibid.* Relying on the Double Jeopardy Clause of the Fifth Amendment, petitioner moved to dismiss the indictment on the ground that he had already been punished for the offenses charged, because the quantities of cocaine involved had been included in determining his sentence for the 1991 offense of attempted possession of marijuana. See J.A. 1, 130.

The district court dismissed the indictment. J.A. 130-136. Relying on *United States* v. *Koonce*, 945 F.2d 1145 (10th Cir. 1991), cert. denied, 112 S. Ct. 1695 and 112 S. Ct. 1705 (1992), the court ruled that "[t]he government cannot be permitted to craft or develop a scheme by which a person may be twice punished." J.A. 135. The court also indicated its agreement with the sentencing court's determination that petitioner's activities in 1990 and 1991 were part of "one common scheme or plan." J.A. 135-136. The court concluded that the indictment was barred by the Double Jeopardy Clause "because it seeks to punish a second time conduct already punished." J.A. 136.

The court of appeals reversed. J.A. 137-166. Relying on *Williams* v. *Oklahoma*, 358 U.S. 576 (1959), the court held that "the use of relevant conduct to increase the punishment of a charged offense does not punish the offender for the relevant conduct." J.A. 153. Accordingly, although the quantity of cocaine involved in petitioner's 1990 cocaine importation scheme was considered in determining the sentence for his 1991 marijuana possession offense, the court concluded that petitioner was not punished for his cocaine activities in the first prosecution. The Double Jeopardy Clause therefore did not bar petitioner's later prosecution and punishment for the cocaine offenses. J.A. 153-154. The court disagreed with the holdings in *United States* v. *Koonce*, *supra*, and in *United States* v. *McCormick*, 992 F.2d 437 (2d Cir.

1993), that when a defendant's actions are included as relevant conduct in determining the punishment under the Sentencing Guidelines for one offense, those actions may not form the basis for a later indictment without violating the Double Jeopardy Clause. J.A. 145-150.

Even if consideration of petitioner's cocaine importation activities in determining his sentence for attempted possession of marijuana constituted punishment, the court of appeals concluded that Congress intended petitioner to be subject to additional punishment for the cocaine offenses. J.A. 154-160. The court observed that Guidelines § 5G1.3 contemplates that related offenses will sometimes result in multiple prosecutions, indicating only an intention that the cumulative punishment resulting from separate prosecutions should not normally exceed "that which would have resulted from prosecution and conviction on both counts in a single proceeding." J.A. 158. The court concluded that because the Guidelines authorize imposition of concurrent sentences in separate proceedings in such cases, the punishment imposed in the second prosecution does not violate the Double Jeopardy Clause. J.A. 158-160.[2]

SUMMARY OF ARGUMENT

The Double Jeopardy Clause prohibits successive prosecutions or multiple punishments for "the same offence." U.S. Const. Amend. V. This case does not in-

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[2] The court of appeals rejected petitioner's claim that a concurrent sentence for the second offense could not exceed the sentence for the first offense when the first sentence resulted from a downward departure from the Guidelines sentencing range based on a substantial assistance motion under Guidelines § 5K1.1. J.A. 160-162. The court also rejected petitioner's claim that the indictment should be dismissed on the theory that the government had breached its plea agreement. J.A. 162-165.

volve successive prosecutions for the "same offence," because the statutes, events, and dates involved in the cocaine importation offenses charged in the present indictment differ from those involved in the attempted possession of marijuana offense to which petitioner previously pleaded guilty. Nor does the instant prosecution threaten petitioner with unconstitutional multiple punishment, because petitioner has never before been punished for the offenses set out in the present indictment. Petitioner's "double jeopardy" theory—that the consideration of the conduct charged in the present indictment in formulating his prior sentence "punished" him for that conduct as though it were a separate "offense"—has no support in this Court's cases.

1. Petitioner pleaded guilty in 1992 to a particular crime: attempting to possess marijuana with the intent to distribute it, in violation of 21 U.S.C. 841(a) and 846. In sentencing petitioner for that crime, the district court applied the "relevant conduct" provisions of the United States Sentencing Guidelines and took account of certain other criminal conduct, not previously the subject of any criminal charges, that the court attributed to petitioner. Petitioner chose not to appeal that decision.

Federal prosecutors then sought and obtained an indictment charging petitioner with two new and different crimes: conspiring to import, and attempting to import, cocaine into the United States, in each case in violation of 21 U.S.C. 952(a) and 963. In light of the elements of those offenses, this Court's cases make clear that the importation charges at issue do not seek to punish "the same offence" as the attempted possession of marijuana offense to which petitioner previously pleaded guilty. That observation should bring the constitutional double jeopardy analysis to an end.

2. Petitioner nonetheless argues that because the conduct to be proved in support of the indictment in this case was taken into account in determining his sentence for a prior offense, any punishment imposed in this prosecution would necessarily be multiple punishment in violation of the Double Jeopardy Clause. That argument is wrong, because petitioner has never before been "punished" for the "same offence" with which he is now charged. This Court's cases make clear that whatever conduct or characteristics of a defendant are considered in imposing sentence for an offense, the resulting sentence constitutes "punishment" only for the offense of conviction.

The Sentencing Reform Act of 1984 and the Sentencing Guidelines promulgated under it do not change that settled principle. Although the Guidelines formalize and clarify the consideration of uncharged relevant conduct in sentencing an offender, the fact remains that the only offense for which the defendant is being punished within the meaning of the Double Jeopardy Clause is the offense of conviction. The Guidelines' endeavor to systematize prior sentencing practice for the sake of fairness and uniformity does not extend the reach of the constitutional protection against double jeopardy in the manner suggested by petitioner. Indeed, this Court has explicitly rejected a similar "same-conduct" approach to constitutional double jeopardy analysis. See *United States* v. *Dixon*, 113 S. Ct. 2849, 2860 (1993) (overruling *Grady* v. *Corbin*, 495 U.S. 508 (1990)). While Congress could have elected to limit the prospect of multiple prosecutions as petitioner suggests, it did not do so. The Sentencing Guidelines explicitly contemplate the existence of such separate prosecutions, and provide guidance for courts imposing sentences in proceedings other than the first.

The Sentencing Guidelines do endeavor to achieve some coordination of sentences in separate prosecutions for offenses involving related "relevant conduct." It is clear, however, that the Guidelines do not prohibit the government from seeking to convict petitioner of any offense for which he has not previously been prosecuted. This case should therefore be remanded for trial. If petitioner is convicted, the district court will be in the best position to consider, in the first instance, what sentence should be imposed as a result of that conviction, in light of the Guidelines and all the circumstances of the case.

ARGUMENT

I. THE INDICTMENT IN THIS CASE DOES NOT CHARGE PETITIONER WITH THE SAME OFFENSE TO WHICH HE PREVIOUSLY PLEADED GUILTY

The Double Jeopardy Clause provides that no person shall "be subject for the same offence to be twice put in jeopardy of life or limb." U.S. Const. Amend. V. In order to bring himself within the protection of the Clause, petitioner must therefore show, at a minimum, that the government has sought to prosecute or punish him twice for "the same offence." See Br. for Amicus Nat'l Ass'n of Criminal Defense Lawyers (NACDL) 11-12 ("The only real issue in this case is * * * whether petitioner was punished in the first case for the 'same offence' [involved in] the instant indictment."). Petitioner cannot make that showing.

When a defendant alleges successive prosecution or punishment for the same underlying conduct, and each prosecution is based on a different statute, this Court applies the rule articulated in *Blockburger* v. *United*

States, 284 U.S. 299, 304 (1932), to determine whether the two proceedings involve the "same offence":

> [W]here the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not.

As the Court recently reiterated, the *Blockburger* test "inquires whether each offense contains an element not contained in the other; if not, they are the 'same offence' and double jeopardy bars additional punishment and successive prosecution." *United States* v. *Dixon*, 113 S. Ct. 2849, 2856 (1993); see also, *e.g.*, *Brown* v. *Ohio*, 432 U.S. 161, 168-169 (1977); *Gavieres* v. *United States*, 220 U.S. 338, 342 (1911); compare *Grady* v. *Corbin*, 495 U.S. 508 (1990) (overruled by *Dixon*, 113 S. Ct. at 2859-2864).[3]

The offense to which petitioner pleaded guilty and for which he was sentenced in 1992 was attempted possession of marijuana with the intent to distribute it, in violation of 21 U.S.C. 841(a) and 846. J.A. 9-10, 74. The offenses charged in the instant indictment are conspiracy to import cocaine and attempted importation of

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[3] The Court has recognized two special rules in the double jeopardy context, neither of which applies in this case. See *Grady* v. *Corbin*, 495 U.S. at 528 (Scalia, J., dissenting). First, a constitutional collateral estoppel principle precludes relitigation, in a subsequent prosecution, of facts necessarily decided in the defendant's favor in a prior criminal case. *Ashe* v. *Swenson*, 397 U.S. 436, 445-446 (1970). Second, certain statutory offenses, such as felony murder, may incorporate other offenses as predicates in such a way as to render the predicate, in effect, a lesser included offense that may not be separately prosecuted under *Blockburger*. See *Harris* v. *Oklahoma*, 433 U.S. 682 (1977) (per curiam); see also *Grady*, 495 U.S. at 528, 537-538 (Scalia, J., dissenting); *Illinois* v. *Vitale*, 447 U.S. 410, 419-421 (1980).

cocaine, in violation of 21 U.S.C. 952(a) and 963. J.A. 82-83. Those offenses are distinct for purposes of the Double Jeopardy Clause. This Court has made clear that even if two prosecutions are based on the same transaction, a substantive charge and a conspiracy charge involve different elements and are constitutionally different offenses. *United States* v. *Felix*, 112 S. Ct. 1377, 1383-1385 (1992). Likewise, this Court has previously concluded that under the *Blockburger* test, a distribution offense is distinct from an importation offense, even when applied to the same underlying conduct. *Albernaz* v. *United States*, 450 U.S. 333, 339, 344 n.3 (1981). Here, the offenses charged are distinct under *Blockburger*, as well as involving different courses of conduct.[4] Because the *Blockburger* test governs both in the "multiple punishment and multiple prosecution contexts," *Dixon*, 113 S. Ct. at 2856, there is no basis for treating these two prosecutions as involving the same offense.[5]

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[4] As the court of appeals recognized (J.A. 164-165), the acts alleged in support of the present indictment are entirely distinct from the acts underlying petitioner's previous conviction. The latter involved the attempted purchase for distribution, by petitioner and his co-defendant Kelly, of 1,000 pounds of marijuana in early 1991. In this case, by contrast, the government would seek to prove that petitioner and a different co-defendant conspired and attempted to import substantial quantities of marijuana and cocaine from Mexico and Guatemala between mid-1989 and mid-1990. As the court of appeals pointed out (J.A. 165), the two indictments involve different times, locations, parties, objects, and overt acts.

[5] The court of appeals recognized that the two prosecutions at issue here "clearly" involved different offenses. It nonetheless proceeded to consider the case on what it characterized as "both parties' assum[ption] that the 'same offense' element is satisfied" under *Blockburger*. J.A. 145 n.17. The government's brief in the

II. THE DOUBLE JEOPARDY CLAUSE DOES NOT BAR PROSECUTION AND PUNISHMENT FOR CRIMINAL CONDUCT PREVIOUSLY TAKEN INTO ACCOUNT IN DETERMINING THE DEFENDANT'S SENTENCE FOR A DIFFERENT OFFENSE

Despite the existence of constitutionally distinct offenses in petitioner's two prosecutions, petitioner (Br. 14-50) and his amicus (NACDL Br. 13-23) contend that petitioner was previously "punished" for the offenses involved in the present prosecution, and that he is therefore protected against further punishment by the Double Jeopardy Clause's prohibition against the imposition of "multiple punishments for the same offense." *North Carolina* v. *Pearce*, 395 U.S. 711, 717 (1969). That constitutional claim must rest on the theory that (i) certain conduct not charged in petitioner's previous prosecution amounts to an "offense" for constitutional purposes; (ii) petitioner was "punished" for that "offense" when that conduct was considered, as "relevant conduct" under the Sentencing Guidelines, in determining the sentence imposed (for the offense of conviction) in the earlier prosecution; and therefore (iii) he cannot now be tried under an indictment that would require the government to prove the conduct underlying that "offense." This Court has consistently held, however, that consideration of information about the defendant's character and conduct at sentencing does not result in "punishment" of the defendant for any "offense"

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court of appeals made no such assumption; indeed, its entire tenor is to the contrary. See, *e.g.*, Gov't C.A. Br. 9 ("Because each statutory provision requires proof of a fact that the other does not, the imposition of consecutive sentences is permissible; likewise, a separate prosecution is not constitutionally barred."); *id.* at 22-24 (citing, *inter alia*, *Albernaz*, *Blockburger*, and *Dixon*).

other than the one of which he was convicted. Nothing in the Sentencing Reform Act or the Guidelines changes that constitutional analysis.[6]

A. Consideration Of Uncharged Conduct In Sentencing A Defendant For One Offense Does Not Constitute "Punishment" For Any Other Offense Under The Double Jeopardy Clause

1. It is well established that a sentencing court may conduct a broad inquiry into a defendant's background, character, and conduct in establishing an appropriate sentence for any offense of which he has been convicted. *Wisconsin* v. *Mitchell*, 113 S. Ct. 2194, 2199 (1993); *United States* v. *Grayson*, 438 U.S. 41, 49-50 (1978); *United States* v. *Tucker*, 404 U.S. 443, 446 (1972); see 18 U.S.C. 3661 ("No limitation shall be placed on the information concerning the background, character, and conduct of a person convicted of an offense which a court of the United States may receive and consider for the purpose of imposing an appropriate sentence."); 21 U.S.C. 850. Traditionally, "[s]entencing courts have not only taken into consideration a defendant's prior convictions,

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[6] Most courts of appeals that have considered the issue have rejected the theory on which petitioner's argument is based. See, *e.g.*, *United States* v. *Cruce*, 21 F.3d 70, 76-77 (5th Cir. 1994); *United States* v. *Mack*, 938 F.2d 678, 679 (6th Cir. 1991); *United States* v. *Brown*, 31 F.3d 484, 494-496 (7th Cir. 1994); *United States* v. *Williams*, 935 F.2d 1531, 1538 (8th Cir. 1991), cert. denied, 502 U.S. 1101 (1992); *United States* v. *Nyhuis*, 8 F.3d 731, 738-740 (11th Cir. 1993), cert. denied, 115 S. Ct. 56 (1994); see also *United States* v. *McKinley*, 38 F.3d 428 (9th Cir. 1994) (declining to reach issue as unripe); *United States* v. *Garcia*, 919 F.2d 881, 885-887 (3d Cir. 1990) (rejecting related arguments, although reserving precise question at issue here). But see *United States* v. *McCormick*, 992 F.2d 437 (2d Cir. 1993); *United States* v. *Koonce*, 945 F.2d 1145 (10th Cir. 1991), cert. denied, 112 S. Ct. 1695 and 112 S. Ct. 1705 (1992).

but have also considered a defendant's past criminal behavior, even if no conviction resulted from that behavior." *Nichols* v. *United States*, 114 S. Ct. 1921, 1928 (1994). In *Williams* v. *New York*, 337 U.S. 241 (1949), this Court upheld a trial court's reliance on evidence of several prior burglaries, with which the defendant had never been charged, in rejecting a jury's recommendation of a life sentence and instead imposing a sentence of death for the murder of which the defendant was convicted. And in *McMillan* v. *Pennsylvania*, 477 U.S. 79 (1986), the Court upheld the use of uncharged conduct connected to the offense of conviction—visible possession of a firearm during its commission—as a statutory factor requiring the imposition of a five-year minimum sentence.

Although the Court has recognized that sentencing courts routinely consider uncharged conduct in sentencing for the offense of conviction, it has never held that the defendant is thereby "punished" for that uncharged conduct as if it were an independent offense. To the contrary, the Court has rejected the claim that the consideration of uncharged conduct at sentencing can support a claim under the Double Jeopardy Clause. In *Williams* v. *Oklahoma*, 358 U.S. 576 (1959), the defendant, after being sentenced to life imprisonment for murder, was separately charged with the kidnapping that led to his victim's death. In imposing a sentence of death for the kidnapping, the second trial court expressly relied on the related murder as a basis for the sentence. *Id.* at 581. Relying on the "obvious fact" that the two offenses of conviction were "entirely distinct," this Court rejected the defendant's contention that consideration of the murder in sentencing for the kidnaping "punished him a second time for the same offense." *Id.* at 584-586. Cf. *Schiro* v. *Farley*, 114 S. Ct. 783, 789-790

(1994) (consideration of conduct underlying a criminal charge of which defendant was acquitted as an aggravating factor in capital sentencing proceeding for a separate offense does not violate double jeopardy). While a court may consider a wide variety of conduct in fashioning an appropriate sentence, it imposes that sentence, and "punishes" the defendant, only for the offense of which the defendant has been convicted in the particular proceeding in which the sentence is imposed. There is therefore no double jeopardy bar to a subsequent prosecution based on the prior consideration of the underlying conduct in a sentencing proceeding for a different offense.

2. Petitioner's theory—that consideration in criminal sentencing of uncharged conduct amounts to "punishment" for that conduct—would have far-reaching and untenable implications.[7] Under petitioner's logic, for example, common sentence enhancements based on prior convictions would impermissibly "punish" the defendant again for the conduct underlying those convictions. This Court, however, has repeatedly held that recidivism statutes do not impose additional punishment for prior offenses in any way that violates the Double Jeopardy

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[7] Petitioner argues (Br. 46) that his theory is not intended to apply to sentencing schemes in which "a legislature has not mandated mandatory real offense sentencing," and on that basis suggests (Br. 29) that it is not inconsistent with *Williams* v. *Oklahoma*, *supra*. See also NACDL Br. 20-21. If petitioner's theory were correct, however, it would logically apply to any sentencing scheme in which uncharged conduct is used to enhance the sentence for the offense of conviction. See also *McMillan*, 477 U.S. at 92 ("We have some difficulty fathoming why the due process calculus would change simply because the legislature has seen fit to provide sentencing courts with additional guidance."); *United States* v. *Dunnigan*, 113 S. Ct. 1111, 1118 (1993).

Clause. See *Spencer* v. *Texas*, 385 U.S. 554, 560 (1967); *Oyler* v. *Boles*, 368 U.S. 448, 451 (1962); *Gryger* v. *Burke*, 334 U.S. 728, 732 (1948); *Graham* v. *West Virginia*, 224 U.S. 616, 623 (1912); *McDonald* v. *Massachusetts*, 180 U.S. 311, 313 (1901); *Moore* v. *Missouri*, 159 U.S. 673, 678 (1895); see also *Parke* v. *Raley*, 113 S. Ct. 517, 522 (1992). The Court has explained that the enhanced punishment imposed under recidivist statutes "is not to be viewed as either a new jeopardy or additional penalty for the earlier crimes," but instead as "a stiffened penalty for the latest crime, which is considered to be an aggravated offense because a repetitive one." *Gryger*, 334 U.S. at 732.

Petitioner's theory would also complicate, and probably prevent, most prosecutions for conspiracy after a defendant had previously been convicted of a substantive offense based on the same conduct. Although the gist of a conspiracy is the unlawful agreement, see *United States* v. *Shabani*, 115 S. Ct. 382, 386 (1994), in sentencing for the conspiracy a court would virtually always consider the substantive harms that the defendant and his co-conspirators accomplished. Under petitioner's theory, sentencing for the conspiracy based in part on a previously prosecuted substantive crime would thus result in unconstitutional multiple punishment. This Court, however, recently reaffirmed that the Double Jeopardy Clause does not bar successive prosecutions for substantive and conspiracy offenses growing out of the same conduct. *Felix*, 112 S. Ct. at 1383-1385.

Nor can petitioner's theory be squared with this Court's cases that allow a sentencing court to enhance a sentence based on conduct that has never resulted in a conviction. A criminal penalty may be imposed only after an offense has been established in accordance with "the

procedural safeguards required as incidents of a criminal prosecution," including proof of the underlying facts beyond a reasonable doubt. *Kennedy* v. *Mendoza-Martinez*, 372 U.S. 144, 167 (1963); see *In re Winship*, 397 U.S. 358, 364 (1970). This Court, however, has upheld the consideration by the sentencing court of uncharged conduct that the judge finds to have occurred under a preponderance-of-the-evidence standard. *McMillan*, 477 U.S. at 84-92; see *Nichols*, 114 S. Ct. at 1927-1928.[8] If petitioner were correct that the enhancement of a sentence based on uncharged conduct resulted in punishing the defendant for that conduct as though it were a separate offense, the lower standard of proof and less rigorous procedural protections applied in criminal sentencing would be constitutionally suspect. Those sentencing procedures are constitutional precisely because a defendant is "punished" only for the offense of which he was convicted.

Petitioner can draw no support from this Court's decisions holding that "punishment" can occasionally be meted out in civil as well as criminal proceedings. See Pet. Br. 32-33; NACDL Br. 3-6, 14. In *United States* v. *Halper*, 490 U.S. 435 (1989), and *Department of Revenue*

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[8] While the Court has noted that it would raise due process concerns if a statute were "tailored to permit the [sentencing factor] finding to be a tail which wags the dog of the substantive offense," *McMillan*, 477 U.S. at 88, 89-90, the federal Sentencing Guidelines are not vulnerable to that objection, because they simply structure the appropriate sentence within a congressionally defined maximum sentence for the offense of conviction. In any event, such a claim could be raised only as a due process or Eighth Amendment challenge to the sentence resulting in part from consideration of the uncharged conduct—not as a double jeopardy challenge to a subsequent prosecution for a separate offense involving that conduct.

v. *Kurth Ranch*, 114 S. Ct. 1937 (1994), the Court held that, in certain unusual circumstances, a successive proceeding to collect a civil penalty or tax based on an offense for which a defendant has previously been convicted may violate the Double Jeopardy Clause. In *Halper* and *Kurth Ranch*, however, it was conceded or assumed that both of the relevant proceedings involved "the same offence" for double jeopardy purposes. See *Halper*, 490 U.S. at 437-438, 441 & n.4; *Kurth Ranch*, 114 S. Ct. at 1947. That is not true here. Moreover, while *Halper* and *Kurth Ranch* indicate that civil fine or tax proceedings may sometimes result in "punishment," neither decision suggests that the quintessential criminal sanction, imprisonment, may be imposed, in *any* proceeding, for an offense for which the defendant has been neither indicted nor tried.

Finally, petitioner's theory not only is unsupported by this Court's cases, but also would prove unworkable in practice. If, for example, a defendant were first convicted of unlawful possession of a handgun, the sentencing judge might impose a statutory maximum five-year sentence, rather than the fine or lesser sentence otherwise usual for a first offender, on the ground that the defendant obtained the gun for use in a murder.[9] Under petitioner's theory, the defendant could not later be prosecuted or sentenced for the murder, because he would already have suffered "punishment" by consideration of the same conduct in the handgun prosecution. The application of petitioner's view would also require

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[9] This hypothetical is not intended to reflect particular existing federal statutes or applications of the current Sentencing Guidelines. Because petitioner requests judgment on constitutional grounds, the logic of the Court's decision will apply to all state and federal charging and sentencing schemes, now and in the future.

sentencing courts to translate the "acts and omissions" taken into account at a prior sentencing, see Guidelines § 1B1.3(a)(2), into one or more "offenses" that could be compared to the offense charged in a subsequent prosecution. Not only is that inquiry amorphous, it is contrary to this Court's determination that the double jeopardy inquiry should focus on the elements of the charged offenses, rather than on a defendant's underlying conduct. See *United States* v. *Dixon*, 113 S. Ct. at 2864 & n.16 (discussing "confusion" arising from attempts to apply conduct-based, rather than element-based, analysis in double jeopardy context, and returning to the "elements" approach).

B. Nothing In The Sentencing Reform Act Or The Sentencing Guidelines Changes The Constitutional Analysis

Petitioner and his amicus contend that, whatever the correct result in other sentencing contexts, the Sentencing Reform Act of 1984, 18 U.S.C. 3551-3742 and 28 U.S.C. 991-998, and the Sentencing Guidelines change the double jeopardy analysis. See, *e.g.*, Pet. Br. 14-31, 41-47; NACDL Br. 14-22. While the Act "revolutionized the manner in which district courts sentence persons convicted of federal crimes," *Burns* v. *United States*, 501 U.S. 129, 132 (1991), the revolution was one of sentencing goals, determinacy, and consistency, not one of offense definition or constitutional theory.

1. Before the Act, each district court exercised wide case-by-case discretion in imposing a sentence within the often broad statutory limits defined by Congress for particular offenses. The Act directed the Sentencing Commission to develop comprehensive guidelines to channel that discretion. See *Burns*, 501 U.S. at 132-133; *Mistretta* v. *United States*, 488 U.S. 361, 363-367 (1989). District courts are generally required to impose a

sentence within a Guidelines range resulting from various offense-related and offender-related factors. 18 U.S.C. 3553(a)(4) and (b). The reform was intended primarily "to eliminate the 'unwarranted disparit[ies] and . . . uncertainty' associated with indeterminate sentencing." *Burns*, 501 U.S. at 133 (quoting S. Rep. No. 225, 98th Cong., 1st Sess. 49 (1983)).

In fashioning the Sentencing Guidelines, the Sentencing Commission rejected a "pure real offense" sentencing scheme, and instead adopted a "charge offense" system that "contain[s] a significant number of real offense elements."[10] United States Sentencing Comm'n, *Guidelines Manual* Ch. 1, Pt. A, ¶ 4(a) at 4-5 (Nov. 1, 1994) (Policy Statement); see also Breyer, *The Federal Sentencing Guidelines and the Key Compromises Upon Which They Rest*, 17 Hofstra L. Rev. 1, 8-12 (1988). Under Guidelines Sections 1B1.1(a) and 1B1.2(a), a defendant's offense of conviction determines the offense guideline that a court must consult. For petitioner's drug importation and distribution offenses, the applicable guideline is Section 2D1.1, which specifies different base offense levels depending on the quantity of drugs involved. Under Sections 1B1.2(b) and 1B1.3, however, the quantity to be used for purposes of Section 2D1.1 must be based on all of the defendant's "relevant conduct," not simply on the conduct underlying the offense of conviction. Section

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[10] A pure "real offense" system bases the sentence on all related conduct in which the defendant engaged, regardless of the elements of the offense of conviction. A pure "charge offense" sentencing system bases the defendant's sentence solely on the conduct satisfying the elements of the offense on which the defendant was convicted. See United States Sentencing Comm'n, *Guidelines Manual* Ch. 1, Pt. A, ¶ 4(a) at 4-5 (Nov. 1, 1994) (Policy Statement).

1B1.3(a)(2) provides that in the case of "offenses of a character for which § 3D1.2(d) would require grouping of multiple counts," including all drug offenses, "relevant conduct" generally includes all acts for which the defendant could be held responsible that were "part of the same course of conduct or common scheme or plan as the offense of conviction." A drug defendant's base offense level under Section 2D1.1 therefore reflects the aggregate quantity of drugs involved in the offense of conviction and in any charged or uncharged "relevant conduct."

2. Contrary to petitioner's contentions (Br. 15-31), nothing in the Guidelines scheme suggests that the defendant has been "punished," for double jeopardy purposes, for "relevant conduct" that is included in the calculation of his offense level—any more than he would have been if a pre-Guidelines court had, in its discretion, taken the same uncharged conduct into account in imposing the same sentence for the same offense of conviction. The "relevant conduct" provisions of the Guidelines merely reflect past practice and channel future discretion by recognizing, in a relatively uniform and predictable way, that any offense of conviction is more serious if it represents not an isolated event, but part of a larger pattern of criminal or anti-social conduct. As courts have therefore recognized, "very roughly speaking, [relevant conduct] corresponds to those actions and circumstances that courts typically took into account when sentencing prior to the Guidelines' enactment." *United States* v. *Wright*, 873 F.2d 437, 441 (1st Cir. 1989) (Breyer, J.); *United States* v. *Mack*, 938 F.2d 678, 681 (6th Cir. 1991) ("Section 1B1.3 of the Sentencing Guidelines simply memorializes a long standing practice of trial judges."); see also Wilkins & Steer, *Relevant Conduct: The Cornerstone of the*

Federal Sentencing Guidelines, 41 S.C. L. Rev. 495, 516 (1990) (Section 1B1.3(a)(2) "simply formalizes the pre-guidelines practice of considering the full range of a defendant's conduct for sentencing purposes, regardless of whether all of such criminal activity was encompassed within counts of conviction.").

Under the Sentencing Guidelines, the presence or absence of related but uncharged criminal conduct often has an objectively measurable effect on a defendant's sentence, while under the prior system it generally did not. The fact that the sentencing process has become more transparent under the Guidelines, however, does not mean that the defendant is now being "punished" for uncharged relevant conduct as though it were a distinct criminal "offense." Nor does the mandatory character of the consideration of relevant conduct alter the determination of whether the defendant is being punished for that conduct. Cf. *United States* v. *Dunnigan*, 113 S. Ct. 1111, 1118 (1993) (rejecting view that mandatory character of Guidelines enhancement changes applicable constitutional test). As before, a defendant is punished only for the offense of conviction. See, *e.g.*, *United States* v. *Duarte*, 28 F.3d 47, 48 (7th Cir. 1994).[11]

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[11] Petitioner seeks to distinguish (Br. 28-29) this Court's decision in *Williams* v. *Oklahoma*, 358 U.S. 576 (1959), because the judge in *Williams* was not "required" to consider uncharged conduct and because in pre-Guidelines regimes it could be difficult to tell what "weight" was given to uncharged aspects of the defendant's conduct. But petitioner fails to explain why the application of the Double Jeopardy Clause should turn on whether the "punishment" for the uncharged offense was discretionary or mandatory. Nor does he explain why the Clause should not have been applied in *Williams* itself, where the uncharged conduct (a murder) was explicitly considered by the court in imposing a capital sentence. 358 U.S. at 581. Even in non-Guidelines cases, the effect of taking uncharged conduct into account may be both

The Constitution has always permitted prosecution and punishment for previously uncharged criminal conduct, even if some or all of that conduct was considered in determining an earlier sentence for a different offense. It cannot be constitutionally significant whether the earlier consideration took the form of an essentially discretionary sentence enhancement, as in pre-Guidelines cases; an essentially prescribed adjustment to the defendant's base offense level under the Guidelines, as in this case; or a largely or partly discretionary decision to fix the defendant's sentence within a particular Guidelines range.[12]

Petitioner argues (Br. 22) that his interpretation of the Guidelines and double jeopardy analysis under them is necessary to avoid abusive successive prosecutions. There are often valid reasons, however, why related crimes committed by a defendant are not prosecuted in the same proceeding. In some cases, venue for all of the crimes does not lie in the same district. See *Williams* v. *Oklahoma*, 358 U.S. at 578. In other cases, like this one, some charges may be ripe for prosecution before the investigation into others has been completed. See note 1, *supra*. This Court has consistently rejected the view that the Double Jeopardy Clause requires all offenses that are part of the same general criminal transaction to

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explicit and measurable. See, *e.g.*, *Williams* v. *New York*, 337 U.S. at 244 (uncharged burglaries and other sentencing information explicitly used to enhance life sentence to capital punishment).

[12] See, *e.g.*, *Sekou* v. *Blackburn*, 796 F.2d 108, 111 (5th Cir. 1986) (pre-Guidelines); *United States* v. *Cruce*, 21 F.3d at 76-77 (adjustment of base offense level); *United States* v. *Mack*, 938 F.2d at 679 (fixing sentence within Guidelines range).

be prosecuted in the same proceeding. See, *e.g.*, *Dixon*, 113 S. Ct. at 2860, 2863 n.14.[13]

In essence, petitioner argues that the Guidelines' treatment of uncharged conduct in determining the appropriate sentence for an offense of conviction transforms that conduct into an independent "offense" for which the defendant suffers independent "punishment" within the meaning of the Double Jeopardy Clause. The Guidelines, however, have altered only the consistency and transparency, not the substance, of sentencing practice. While it is therefore easier to quantify the impact on a defendant's sentence of specific uncharged conduct under the Guidelines than it was under prior practice, that is not the same as saying that Congress has enlarged or changed the nature of the "offense" for which the defendant has been punished. Indeed, as the Guidelines themselves suggest, sentencing for the offense of conviction simply includes consideration of uncharged "relevant *conduct*." Sentencing Guidelines § 1B1.3 (emphasis added). Attempting to use that conduct, rather than the elements of the offense of conviction, as a basis for double jeopardy analysis would resemble nothing so much as the "same conduct" approach of *Grady* v. *Corbin* that this Court has definitively rejected. *Dixon*, 113 S. Ct. at 2864.[14]

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[13] The Court has also noted that it is not necessary to distort double jeopardy principles to prevent abuses, because the government is surely "deterred from abusive, repeated prosecutions of a single offender for similar offenses by the sheer press of other demands upon prosecutorial and judicial resources." *Dixon*, 113 S. Ct. at 2863 n.15.

[14] Petitioner suggests (Br. 42) that, as a result of the relevant conduct provision of the Guidelines, "Congress [has] incorporated the United States Sentencing Guidelines into each provision of the federal criminal code," so that each statutory criminal offense

3. Of course, Congress could restrict or prohibit prosecution of offenses when the underlying conduct has been previously considered in sentencing for a different offense. Neither the Sentencing Reform Act nor the Guidelines, however, imposes any such restriction. Rather, the Guidelines themselves explicitly contemplate the possibility of separate prosecutions involving the same or overlapping "relevant conduct."

Guidelines § 5G1.3(b) addresses cases in which a defendant who is already in prison is sentenced, in a second case, for another offense committed before his imprisonment began, and in which "the undischarged term of imprisonment resulted from offense(s) that have been fully taken into account in the determination of the offense level for the instant offense." Conduct under-

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includes all relevant conduct as well. See also NACDL Br. 18-19. He relies (Pet. Br. 41-43) on an analogy to Justice Scalia's view in *Dixon* that the condition of release the violation of which supported Dixon's conviction for contempt "incorporated the entire governing criminal code." 113 S. Ct. at 2857 (opinion of Scalia, J.). That argument is unsound. First, while the government was required to prove the relevant condition of release to convict Dixon of contempt, the government was not required to prove "relevant conduct" to obtain a conviction of petitioner. "Relevant conduct" is a sentencing factor only. See also *United States* v. *Soto-Olivas*, 44 F.3d 788, 791-792 (9th Cir. 1995) (rejecting argument that revocation of supervised release barred later prosecution for conduct that led to revocation; distinguishing *Dixon*). Second, Congress's reform of sentencing practices did not change the definition of each criminal offense. Indeed, if petitioner were correct, a prosecution for each such newly defined "offense" would require indictment and a jury determination of guilt on each "element" of relevant conduct. See *Hamling* v. *United States*, 418 U.S. 87, 117 (1974); *In re Winship*, *supra*. Those anomalies can be avoided only by rejecting petitioner's premise that the Guidelines' relevant conduct provision has changed the scope of each statutory offense.

lying the first conviction will have been "fully taken into account" in determining the offense level (rather than the criminal history score) applicable to the second conviction only if it is "relevant conduct" with respect to (or the same conduct that underlies) the second conviction. And because the definition of "relevant conduct" is reciprocal, cases to which Section 5G1.3(b) applies because of the "relevant conduct" rules will normally also be cases in which the conduct underlying the second conviction was previously considered as "relevant conduct" in determining the Guidelines sentence for the first conviction—cases, that is, like this one, that petitioner claims should be barred entirely as a matter of double jeopardy.

Thus, as the court of appeals observed, Section 5G1.3(b) "clearly permits a defendant to be prosecuted—and sentenced—in more than one federal proceeding for different criminal offenses that were part of the same course of conduct." J.A. 157 (emphasis omitted). Indeed, the Guidelines commentary specifically notes that Section 5G1.3(b) addresses cases, among others, in which "a defendant is prosecuted in * * * two or more federal jurisdictions, for the same criminal conduct or for different criminal transactions that were part of the same course of conduct." Thus, while congressional intent does not control the constitutional analysis in this context, it is incorrect to claim that the Sentencing Reform Act or the Guidelines preclude successive federal prosecutions involving "the same criminal conduct or * * * the same course of conduct," or that Congress or the Sentencing Commission contemplated that such prosecutions would be constitutionally barred as a result of applying the Guidelines' "relevant conduct" rules. See, *e.g.*, *United States* v. *Cruce*, 21 F.3d 70, 77 n.11 (5th Cir. 1994).

4. Much of petitioner's argument may be best understood as relevant not to the constitutional permissibility of trial under the present indictment, but to the proper application of the Sentencing Guidelines if he is convicted. See, *e.g.*, Pet. Br. 34-50; NACDL Br. 14-17. Guidelines § 5G1.3 does endeavor to achieve some coordination of sentences imposed in separate prosecutions for different offenses involving the same or related conduct. The present Section 5G1.3(b) provides that where the sentence imposed in a second prosecution takes full account of offenses for which the defendant is already serving an unexpired prison term, the new sentence should run concurrently with the existing sentence. Application Note 2 provides further that a court imposing a second sentence under subsection (b) "should adjust for any term of imprisonment already served as a result of the conduct taken into account in determining the sentence for the instant offense." Where subsection (b) does not apply, Section 5G1.3(c) provides for the imposition of consecutive sentences, but only "to the extent necessary to achieve a reasonable incremental punishment." Application Note 3 explains that "[t]o the extent practicable, the court should consider a reasonable incremental penalty to be a sentence for the instant offense that results in a combined sentence * * * that approximates the total punishment that would have been imposed * * * had all of the * * * sentences [been] imposed at the same time." See also 18 U.S.C. 3584-3585.

The application of Section 5G1.3 to the facts of this case is not ripe for review at this time. First, of course, on remand petitioner might be acquitted, in which case the issue would not arise. Second, if petitioner is convicted, whether subsection (b) or subsection (c) applies at sentencing will depend on whether the sen-

tencing court treats petitioner's attempted possession of marijuana as "relevant conduct" with respect to the present cocaine conspiracy and importation offenses. Finally, as amicus NACDL points out (Br. 8), the version of Section 5G1.3 and its commentary in effect at the time of the offenses charged in the present indictment differs from the present version. See United States Sentencing Comm'n, *Guidelines Manual* App. C, Amend. 385, at 268 (Nov. 1, 1994); see also Sentencing Guidelines § 1B1.11 (Guidelines in effect at sentencing apply unless application of changes would violate the Ex Post Facto Clause). Moreover, the Sentencing Commission recently sought public comment on alternative possible amendments to Section 5G1.3 and its accompanying commentary. 60 Fed. Reg. 2430, 2465-2469 (1995). Thus, it is not clear what version of Section 5G1.3 would apply at sentencing in this case.

For all these reasons, arguments relating to the proper application of the Sentencing Guidelines in the event that petitioner is convicted under the present indictment are premature. Because petitioner's constitutional claim is without merit, the court of appeals' judgment reinstating the indictment in this case should be affirmed, and the case should be remanded for trial.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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